4. **Legitimate State Interests**. Regulations may not be a taking if they substantially advance legitimate state interests.[71/]

A prohibition on discriminatory access does not meet any of the traditional criteria that the courts concluded makes a regulation a taking. In contrast with a blanket requirement that pathways owners must allow access to buildings,[72/] a requirement that they provide other telecommunications carriers the same access rights does not mandate a physical invasion of property. A nondiscrimination requirement does not deprive pathways owners of the economic value of their property, nor does it interfere with or diminish in any way their investment expectations. Fundamentally, pathways owners' investment expectations are determined by the revenues from the telecommunications services they provide, and not from the sale of pathways. Certainly, a nondiscrimination rule advances a legitimate state interest in promoting competition.

C. Access Refusals for Insufficient Capacity

Generally, whether there is sufficient capacity for another carrier's facilities will depend on individual facts. In its comments, MFS recommended that access should not be refused due to insufficient capacity if it is possible to rearrange existing facilities to accommodate a new

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71/ *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886, 2897 (1992).

72/ The Court has held that a requirement that building owners allow cable television providers to emplace cable facilities is a taking even though the space required would be *de minimis*. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982). In this case, however, MFS is not suggesting that the Commission mandate entry, but that it prohibit discriminatory treatment.

user.[73] Consistent with a nondiscrimination requirement, the Commission's rules should not allow pathway owners to reserve unused space for their own future use unless they also provide the same opportunity for future expansion to others. The Commission's rules should also allow any party contesting a claim of insufficient capacity to audit the LEC's outside plant records to verify the claim, and if necessary, conduct a physical inspection of the pathway in question.

Other commentors argued that access should not be limited to excess capacity, but should include capacity that could reasonably be made available.[74] AT&T suggests that any utility with spare capacity (capacity above what is required to serve existing customers and set asides to meet demands of the next year) should be required to make that capacity available to other carriers. If spare capacity is not available, then the utility must free up or create such capacity. AT&T points out that the 1996 Act only permits electric utilities to deny telecommunications carriers access because of insufficient capacity, but because of the enormous capacity of fiber optic cable, it is unlikely that capacity constraints could ever be used to justify a refusal to grant access.[75]

D. Access Refusals for Safety, Reliability and Generally Applicable Engineering Purposes

The only other basis for refusing access is for "reasons of safety, reliability and generally applicable engineering purposes." In its comments, MFS argued that a utility relying on this

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[73] MFS Comments at pg. 10.

[74] See, *e.g.*, MCI Comments at pp. 21, 23; and USTA Comments at pg. 10 (utility may be required to make reasonable accommodations such as rearranging lines for carriers to gain access, providing the requesting carrier bears the costs).

[75] AT&T Comments at pp. 16-17.

basis should be required to justify its decision based on published and accepted safety or engineering standards, such as the National Electric Code, identified in advance, to prevent an ILEC from using safety concerns as a pretense for discrimination. In addition, pathway owners' abilities to levy fees for surveys and engineering reviews of proposed installations should be limited, as ILECs have historically charged unwarranted, unjustified fees (often at overtime rates after asserting that no ILEC personnel are available to perform the required work except after normal working hours) for doing routine reviews of proposed access to their pathways.[76/]

There was no debate among the commentors that access to pathways should be refused in instances where such access creates a safety hazard. Some ILECs, however, suggested that they should be allowed to set minimum training and proficiency standards for all personnel working on their pathways and that they be allowed to deny access to competitors until the competitors' produce proof that their personnel are trained to the ILEC's satisfaction.[77/] As the Cable Companies point out, however, the Commission should watch for a tendency of utilities to invoke "safety and reliability" as a mantra to disguise naked discrimination against access to their pathways.[78/]

E. Modifications to Pathways

In its comments, MFS suggested that the Commission require at least 90 days written notice by pathway owners who intend to modify or relocate attachments or other access to their

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[76/] MFS Comments at pg. 11.

[77/] See, *e.g.*, GVNW Comments at pg. 10.

[78/] Cable Companies Comments at pg. 17.

pathways. MFS also suggested that the assessment of costs associated with the modification of access to pathways should apply only in instances where there is some improvement or change in the nature of the attachment. Thus, if an entity retains the same attachment as it had before the pathway owner's modification or alteration, even if it is moved to a different location, it should not be assessed a share of the owner's costs of modification or alteration.[79/]

Comments regarding the appropriate notification period ranged from 10 days to 12 months.[80/] MFS's suggestion of 90 days seems to be an appropriate median.

Some comments suggested that the costs borne by those who require modification to pathways should be the incremental costs caused by the modification or used by the connector.[81/] Others suggested various apportionment schemes, such as dividing the total costs by the number of entities, charging the same rate for all attachers for five years, charging replacement cost for the entire facility, and setting rates through negotiation.[82/] MFS recommends that only costs that are incremental or caused by the modification, and only those modifications that improve or change the nature of the access should be borne by connectors.

79/ MFS Comments at pg. 12.

80/ See, *e.g.*, ACSI Comments at pg. 12 (12 months); AT&T Comments at pg. 20 (60 days); General Communications Inc. Comments at pp. 3-4 (6 months); MCI Comments at pp. 22, 25 (180 days); PECO Energy Comments at pg. 8 (30 days); TCG Comments at pg. 10 (12 months); and, US West Comments at pg. 19 (60 days).

81/ See, *e.g.*, AT&T Comments at pp. 18-19, 21; MCI Comments at pp. 22, 23-24; TCG Comments at pg. 11; and Time Warner Comments at pg. 16.

82/ See, *e.g.*, Bell Atlantic Comments at pg. 16; BellSouth Comments at pg. 18; Cincinnati Bell Comments at pp. 8-9; and US West Comments at pg. 20.

III. PUBLIC NOTICE OF TECHNICAL CHANGES (¶¶ 189-194)

Public of notice of technical changes is require to assure the interoperability and functionality of interconnected networks. It is a duty imposed on ILECs to prevent them from using their control over network standards to harm competition. In its comments, MFS suggested that notice of technical changes be provided by ILECs through public forums regularly accessed by affected parties (*e.g.*, a posting on the Internet and announcements at industry forums) and written notice delivered by certified mail to any carrier with whom the ILEC has an interconnection or access agreement. The written notice should include: (a) the charges that the ILEC anticipates will apply to the carrier for the change; (b) the specific number of circuits impacted if the change occurs at the time of the notification; (c) the projected minimum, maximum and average down times per affected circuit; (d) alternatives available to the interconnector; and, (e) any other information necessary to evaluate alternatives and effectuate necessary changes or challenges. MFS suggested that notification periods vary by classification of the type of change. Major changes should require a minimum of 18 months notice; location changes should require 12 months notice; and, minor changes should be governed by industry practice as outlined in the ICCF's "RDBS (LERG) Minimum Time Intervals" (included as an Attachment to MFS's comments).[83/]

[83/] MFS Comments at pp. 14-16.

There was general agreement that industry forums and other forms of communications were appropriate for dissemination of planned technical changes,[84] although some commentors noted that smaller carriers do not always participate in all industry forums.[85] A few ILECs suggested that the notification requirements be extended to all LECs and not just ILECs.[86] The duty to make a public disclosure of network changes, however, is specifically identified as an ILEC duty and not a duty of LECs in general. The duty was imposed on ILECs in recognition that they have the requisite size and market power to change their networks in a manner that stymies competition. Realistically, new entrants, such as MFS and others, can do little, if anything, to change their networks in a manner that adversely impacts the ILECs. If MFS changes its network in a manner that is incompatible with NYNEX's network, MFS's customers will bear the lion's share of the problems created by such incompatibility. Thus, MFS and other CLECs have powerful economic incentives to be certain that their networks are 100% interoperable and compatible with the ILECs. Imposing notification requirements on CLECs would be an empty exercise that yields no public benefit. The Commission should recognize the suggestions of ILECs that notice requirements be extended to all LECs as merely an attempt to

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84/ See, *e.g.*, ALTS Comments at pg. 3; AT&T Comments at pg. 24; Ameritech Comments at pg. 28; General Communications Inc. Comments at pg. 5; MCI Comments at pp. 15, 17-18; Ohio Public Utilities Commission Comments at pg. 5; NYNEX Comments at pg. 15; and TCG Comments at pg. 11.

85/ See, *e.g.*, Cox Communications Comments at pg. 11; and, GVNW Comments at pg. 4.

86/ See, *e.g.*, Ameritech Comments at pg. 29; BellSouth Comments at pg. 2; and NYNEX Comments at pp. 15-16.

raise the costs of their competitors rather than a genuine effort to ensure the interoperability of networks.

Many of the comments focused on and supported the Commission's suggestion to use the *Computer III* disclosure requirements.[87] MFS believes that its proposal provides more flexibility and better assures interoperability of interconnected networks than the *Computer III* notification standard. A "make or buy" decision which triggers the Computer III notification requirements is inapplicable to "Major changes." which include any change in network equipment, facilities, specifications, protocols or interfaces that will require other parties to make any modification to hardware or software to maintain interoperability with the ILEC's network. Likewise, a "make or buy" decision is inapplicable to real-world "Location changes," such as opening a new central office or closing an existing central office, relocating a meet point, or changing the access tandem that subtends a particular end-office. MFS recommends that the Commission adopt its three tiered structure for notification rather than try to graft the *Computer III* notification requirements onto interconnection.

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[87] In *Computer III*, the Commission required the BOCs to disclose information at two points in time: (1) at the "'make/buy point,' . . . when a carrier decides to make itself, or to procure from an unaffiliated entity, any product the design of which affects or relies on the network interface," and (2) at least 12 months "prior to the introduction of a new service or network change that would affect enhance service interconnection with the network." Notice at ¶ 192. In no case "could the carrier introduce the service earlier than six months after the public disclosure."

IV. CONCLUSION

For the foregoing reasons, the Commission's rules implementing Section 251 should incorporate the provisions discussed in these comments.

Respectfully submitted,

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Attachment

Affidavit of
Myra Stilfield

from MFS's Comments in
CC Docket 95-184

AFFIDAVIT OF
MYRA STILFIELD
OF BEHALF OF
MFS COMMUNICATIONS, INC.

CC Docket 95-184

1. I, Myra M. Stilfield, am the National Director of Real Estate for MFS Communications, Inc.. My business address is One Tower Lane, Suite 1600, Oakbrook, Illinois 60181.

2. I have been employed by MFS performing building access activities for nearly seven (7) years, in my present position for two and one-half (2 1/2) years. Prior to working for MFS, I spent 11 years in the commercial real estate industry, primarily in corporate real estate departments, and held real estate administration and acquisition positions for Barclays Bank of New York, Dean Witter, Hallmark Cards, and US Sprint.

3. I am responsible for obtaining building access for MFS throughout North America. In that role, I direct five (5) Regional Directors of Real Estate, each responsible for obtaining building access in six (6) respective regions. They accomplish this task by managing some 18 consultants, mainly real estate brokers, who are paid retainers and commissions, and are reimbursed for their expenses.

4. In my role as the National Director of Real Estate, I regularly work with landlords and building owners to obtain building access for MFS. Similarly, the Regional Directors who report to me also negotiate with landlords and building managers to obtain access for MFS. In total, my department's salary, commission and expense budget is about $1.7 million. Those are salary and expenses devoted entirely to obtaining access to buildings that are already served by incumbent telecommunications providers and represent expenses that incumbent telecommunications providers do not face. This amount does not include sums paid for building access in rental or license fees to the

landlords of the buildings we serve.

5. Attachment 1 is a listing prepared under my supervision based on a poll of MFS's Regional Directors that illustrates the difficulties that MFS has in dealing with landlords and building owners. Attachment 1 illustrates several instances where MFS has been unable to obtain building access to provide service to its customers, where access has been (or is being) delayed or denied, or where building access terms are unreasonable. Please be advised that these examples do not comprise our total list of "problem buildings". Due to the press of daily business, I requested a sampling only of difficult buildings from my Regional Directors. Historically, we have consistently experienced these types of scenarios in 90% of the multi-tenant properties we seek to access in North America.

6. The common difficulties that MFS has in negotiations with landlords and building owners fall into five categories:

   1. Obtaining access often requires negotiations with landlords and building owners that span many months and often years. As shown in Attachment 1, it is not unusual to have access negotiations stalled for more than 6 months. Obviously, MFS cannot compete effectively if it takes more than 6 months obtain access to each of the buildings where its tenants are located.

   2. Building-by-building negotiations are the rule. MFS must negotiate a separate access agreement with every building manager and owner it deals with whereas the incumbent provider is already providing service to all the buildings in its service territory. Having access to one building, even adjoining buildings, does not guarantee access to other buildings on similar terms and conditions.

   3. Landlords and building owners often refuse to allow access to a building until tenants request service. Tenants often do not request service because MFS

does not have facilities in their building to provide service. Thus, MFS is caught in an impossible situation where it must have tenant requests to obtain access, but cannot obtain tenant requests until it has access.

4. Landlords view access by competitive service providers as a source of revenues. High rents or insistence on a share of telecommunications revenues are common demands. Often landlords cannot decide what rent to charge, and fail to consummate a lease agreement delaying building entry.

5. Smaller, local landlords are often more willing to enter into reasonable agreements with competitive local telephone companies than are larger, national property management companies.

7. Based on my review of materials circulated to its members, the Building Owners and Managers Association ("BOMA") has generally advised members to use entry by competitive telephone companies as a revenue opportunity. This has inflated the building access charges demanded by landlords, building managers and owners who are BOMA members and greatly extended negotiation periods.

Myra M. Stilfield

Myra Stilfield
National Director, Real Estate
MFS Communications, Inc.

Subscribed and sworn to before me
this 16th day of April, 1996

Mary Ann Ormiston My commission expires 11/3/98

"OFFICIAL SEAL"
MARY ANN ORMISTON
NOTARY PUBLIC
MY COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June 1996, copies of the foregoing REPLY COMMENTS OF MFS COMUNICATIONS COMPANY, INC., Numbering, Access to Rights of Way and Public Notice of Technical Changes, CC Docket No. 96-98, were served via Messenger**, or via First Class Mail, U.S. postage prepaid, to all parties on the attached service list.

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